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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEREK MEEK, Defendant and Appellant.	A134214 (Alameda County Super. Ct. No. CH-50907B)

Appellant Derek Meek was convicted by jury of second degree burglary (Pen. Code, § 459).[1] Meek contends the trial court abused its discretion by denying his motion for a mistrial based on a discovery violation. We affirm.

I. BACKGROUND

Meek and Taimane Ioane agreed to a scheme to fraudulently obtain gift cards from Home Depot by "returning" stolen merchandise. Meek needed Ioane's assistance because she had identification, allowing her to obtain a "refund" for the merchandise. On June 23, 2011, Meek drove Ioane to the Home Depot in the city of Newark. Meek filled a cart with merchandise, and Ioane then took the cart to the merchandise return counter and obtained a gift card for the value of the merchandise. Ioane gave the gift card to Meek.

On July 9, 2011, Meek drove Ioane to a Home Depot in Fremont in a rented van. Meek again left a cart full of merchandise in the store, and Ioane took the cart to the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

returns counter, obtaining a gift card. Home Depot "asset protection specialist" Andrew Hopkins observed Ioane returning a number of expensive items, including a Dyson vacuum, which he viewed as suspicious. Since he had not seen Ioane take the merchandise from the shelves, Hopkins did not interfere and allowed the clerk to issue a gift card for the merchandise. He noted the license plate number of a blue van in which she left. He subsequently reviewed store surveillance video and observed that Ioane had entered the store with an empty cart. He asked the assistant manager to void the gift card transaction and notified Fremont police.

Meek and Ioane took the gift card to the Home Depot in Milpitas where Meek met a friend who tried to use the card. Meek came back to the van and said that there was a problem with the card, and that they needed to return to the Fremont Home Depot to resolve the problem.

Hopkins was advised that someone had tried unsuccessfully to use the gift card at another Home Depot store, and that the person was returning to the Fremont store to rectify the situation. Hopkins notified the police. Once at the Fremont Home Depot store, Ioane went in to inquire about the card. Hopkins recognized her as the woman he had seen at the store earlier that day. Ioane was told that the person who helped her earlier was on break and would not be available for about 15 minutes. Ioane was contacted by Fremont Police Officer Reginald Candler as she walked from the store toward the passenger side of the van in the parking lot. As she started to open the passenger door, she was taken into custody. Meek was in the driver's seat of the van.

As Candler handcuffed her, Ioane stated that she had gone into the store intending to fraudulently return merchandise for cash or a gift card and then to sell the card herself. She did not implicate Meek at the time because she did not want to be a "snitch."

Candler returned to the van and arrested Meek for outstanding warrants, placing him in handcuffs. After initially telling Candler that he did not know what had happened, Meek "blurted out," " 'Hey, the whole thing that went down here is my fault. I told her to do it. I told her what to do to get the card.' "

Officer Jason Lambert arrived at the parking lot to assist Candler. Lambert searched the van with Meek's consent and found a cell phone "near the driver's side." Meek told Lambert that the phone was his.[2] A text message was found on the phone from a person identified as "Kev" saying, "I found someone buying cards at 80 percent all day."

The Trial

Meek was charged only with the commercial burglary that occurred on July 9, 2011. In his opening statement, defense counsel told the jury that Ioane had committed the offenses on both dates without Meek's knowledge or participation, and that on that date of the June 23 offense, "There is no evidence at all that Mr. Meek was on the premises in the Home Depot that day." With respect to the July 9 incident, counsel again argued that Ioane had committed the offense alone, without Meek's knowledge, and said that "there will be no credible evidence that Mr. Meek committed this crime."

The prosecution presented the testimony of Home Depot store personnel, including Hopkins, the two Fremont police officers, and Ioane. Ioane entered into a plea agreement pursuant to which she was allowed to plead no contest to one felony burglary count, with a three-year probation term, and credit for the two weeks in custody that she had already served. A condition of her plea bargain was that she be honest in her testimony.

During Hopkins' direct examination, he testified that he had again reviewed store security video from July 9, 2011, following Meek's preliminary hearing, and observed Meek inside the store.[3] Hopkins said that within a week of the preliminary hearing, he made a copy of the video and gave it to "the Fremont D.A.'s office."

Defense counsel moved for a mistrial, on the basis that he had been denied pretrial discovery of the store video and was unaware of the video before Hopkins testified at

[2] Ioane also testified that the phone the officers found in the van belonged to Meek.

[3] At the preliminary hearing, Hopkins testified that he had not seen Meek on the video.

trial. Counsel acknowledged that the trial prosecutor had also been unaware of the video,[4] but argued that he had been prejudiced because "I got up in opening statement and said—I'm paraphrasing—that there would be no credible evidence to prove that [Meek] was in the store. [¶] Had I been aware of the video, I wouldn't have said that. My trial strategy would have been something other than that."

The court denied the motion for a mistrial, instead ordering Hopkins' testimony relating to his identification of Meek in the video stricken. The court stated: "I'm going to deny the motion for mistrial. And let me put some thoughts on the record, some reasons on the record. [¶] First, I don't think it rises to the level of irreparable harm. I think in the context of all the other testimony that's been presented in this trial, that it does not in light of that rise to that level. [¶] Secondly, having reviewed the transcript on my computer and the realtime feature I have, I think the testimony that Mr. Hopkins has provided has been relatively brief on this question, relatively short. And I think I can tell the jury in no uncertain terms directly that they are to disregard what they have heard from Mr. Hopkins with respect to anything he saw on the video and, in fact, by telling them that maybe heightens their [*sic*]—if I say, Here's what you heard, you heard Mr. Hopkins testify that he made some observations of a video. I'm telling you directly that you are not to consider his testimony with respect to that issue for any purpose. And I'm ordering it stricken from the record and for it to not play a role in your deliberations. [¶] . . . I think that that will cure any potential error that might flow . . . from this situation."

When the jury returned to the courtroom, the court gave the following instruction: "I'm going to admonish you and direct you with respect to some testimony that you heard. And I want you to listen to what I have to say obviously. [¶] You heard Mr. Hopkins, the witness who testified here this afternoon, testify to having taken certain action with respect to a videotape that he reviewed with respect to this incident. He

[4] Defense counsel agreed when the court said, "And I believe it's accurate to say that neither of you knew of its existence. Correct?" Defense counsel also said, "I know that [the prosecutor] was not aware of it either."

testified that he did, in fact, view a videotape. He testified with respect to certain things that he purported to see on that videotape and certain people that he purported to see on that videotape. [¶] His testimony in this respect was fairly short, but I'm directing your attention to it. And I'm further directing you at this point that you are to disregard that testimony in its entirety. Not his testimony in its entirety, but his testimony with respect to his having viewed a videotape with respect to this incident and what he purported to see. [¶] You are not to consider his testimony in that regard for any purpose. You're not to allow it to enter your deliberative process when you do begin to deliberate on this case. When you consider the question before you, you are not to consider his comments or testimony in that in any way."

The jury was instructed on aider and abettor liability (CALCRIM Nos. 400, 401, 1702). The jury convicted Meek as charged. The prior conviction allegations were dismissed on the prosecution's motion. On December 9, 2011, the court denied probation and sentenced Meek to a two-year midterm to be served in county jail, with 308 days presentence custody and conduct credit. Meek filed a timely notice of appeal on December 16, 2011.

II. DISCUSSION

Meek challenges only the trial court's denial of his motion for mistrial. As Meek acknowledges, we review for abuse of discretion. "A motion for mistrial is directed to the sound discretion of the trial court. We have explained that '[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 985–986.) We find no abuse of discretion.

The essence of Meek's argument is that: 1) the prosecution committed misconduct by failing to provide pretrial discovery of the July 9 store surveillance video depicting Meek inside the store; and 2) that he was irreparably prejudiced as a result of

the discovery violation. Assuming he is correct on the first point, he fails to establish the necessary second element.

A. *The Discovery Violation*

"The People have a constitutional and a statutory duty to disclose information to the defense. [Citations.]" (*People v. Bowles* (2011) 198 Cal.App.4th 318, 325 (*Bowles*).) It is undisputed that the district attorney's office, after Meek's preliminary hearing but before trial, came into possession of a copy of store surveillance video showing Meek inside the Fremont Home Depot store on July 9, 2011. The video was not disclosed to the defense until October 17, 2011, during the testimony of Andrew Hopkins. It also appears undisputed that the prosecutor trying the case was himself unaware of the video evidence until the witness testified.

1. Brady *Obligation*

The prosecution has a due process obligation under the United States Constitution to disclose exculpatory evidence to the defense. (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.) A failure to provide such material may establish a due process violation if the government's evidentiary suppression " 'undermines confidence in the outcome of the trial.' " (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.) While the prosecution has a broad duty of disclosure, "not every violation of that duty necessarily establishes that the outcome was unjust." (*Strickler v. Greene* (1999) 527 U.S. 263, 281.) "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Id.* at pp. 281–282; see also *People v. Ayala* (2000) 23 Cal.4th 225, 279 (*Ayala*) [evidence "must be both 'favorable' to the defendant and ' "material" ' to either guilt or penalty"].) Meek does not contend that the video is either exculpatory or impeaching, nor as we discuss *post*, does he show prejudice. He therefore fails to establish any denial of due process.

2. *Section 1054.1*

"The California statutory scheme, adopted by initiative in 1990, requires that the prosecution disclose specified information to the defense, as set out in section 1054.1 . . . . Violation of the California statute may result in imposition of sanctions pursuant to section 1054.5." (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 804–805.)[5] The required disclosures are to be made at least 30 days prior to the trial, or immediately if the material and information becomes known to, or comes into the possession of, a party within 30 days of trial. (§ 1054.7.) Section 1054.5, subdivision (b) provides that a court, "[u]pon a showing that a party has not complied with Section 1054.1 . . . may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."

A trial court has broad discretion to fashion a remedy in the event of discovery abuse to ensure that a defendant receives a fair trial. (*People v. Jenkins, supra,* 22 Cal.4th at p. 951; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 792 ["generally, a trial court may, in the exercise of its discretion, 'consider a wide range of sanctions' in response to the prosecution's violation of a discovery order"].) "Although a discovery

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[5] Section 1054.1 provides: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

sanction may include an element of punishment, the record must support a finding of significant prejudice or willful conduct." (*Bowles, supra,* 198 Cal.App.4th at p. 326; see also *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1759 ["there is a distinction between having evidence and refusing to disclose, and discovering evidence and disclosing it at a time when it places the other side at a disadvantage"].)

There is no suggestion here that the prosecution acted willfully or in bad faith. Defense counsel conceded that the prosecutor was also unaware of the existence of the video. The question then is whether Meek suffered "significant prejudice."

Meek asserts on appeal that he was prejudiced by the untimely disclosure because trial counsel was "trapp[ed] . . . into pursuing an untenable theory of defense." He fails to explain how this is so. In the trial court, counsel contended that he had told the jury in his opening statement that there was no credible evidence Meek entered the store on July 9. But, what counsel actually referenced in the opening statement was the absence of evidence that Meek was *in the Newark Home Depot Store on June 23*. Trial counsel argued that, had he been aware of the video, "I wouldn't have said that. My trial strategy would have been something other than that." But, trial counsel offered no suggestion then as to how his strategy in defending the charged July 9 offense might have differed, and appellate counsel offers no hint now.

As the trial judge observed, Hopkin's testimony regarding the video was brief. It is encompassed in slightly over three pages of trial transcript. The court ordered the testimony stricken, and instructed the jury to disregard it "in its entirety." We presume that the jury followed the court's instructions and admonitions. (*People v. Frank* (1990) 51 Cal.3d 718, 728.)

Moreover, the prosecution's theory of the case was always that Meek was an aider and abettor in a crime directly committed by Ioane. In his opening statement, the prosecutor told the jury, "I started off by saying that Mr. Meek and Miss Ioane did this together, but I've been really clear that Mr. Meek stayed in the car and never went in." Meek "stayed in the car." In closing argument, neither side contended that Meek had entered the store on either date. The prosecution specifically told the jury that Meek was

guilty as an aider and abettor, "We have Miss Ioane who goes inside of the Home Depot to actually do the return, and we have Mr. Meek who stays outside and waits for her. Basically, the principle of law that establishes this is called aiding and abetting." Defense counsel, in his closing argument, challenged Ioane's credibility and said, "How about any evidence from that store to corroborate the tale of Miss Ioane? There's none." Later in the argument, Meek's counsel said: "The prosecution's version: Mr. Meek tells Miss Ioane to go commit a crime and she does. And he sent her in there on June the 23rd and July the 7th [*sic*]. And Mr. Meek went in the store too, but there's no evidence of that."

We fail to find anything in the record before us that establishes any significant prejudice to Meek arising from the untimely discovery of an inculpatory video. A motion for mistrial based on a discovery violation "should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*Ayala, supra*, 23 Cal.4th at p. 283) Meek makes no showing of irreparable damage, and no abuse of discretion by the trial court is shown.

B. *Prosecutorial Misconduct*

Meek attempts to cloak his claims in constitutional apparel by characterizing what occurred here as prosecutorial misconduct. " ' "[T]he applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citation.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" ' " (*Ayala, supra,* 23 Cal.4th at pp. 283–284.)

As we have noted, defense counsel acknowledged at trial that the prosecutor was likewise unaware of the existence of the video before trial, and appellate counsel cites nothing in the record that would reflect use by the prosecution of "deceptive or

reprehensible methods." Nor does Meek suggest how the prosecutor was guilty of any egregious behavior. We perceive no action taken by the prosecutor resulting in irreparable harm to Meek's ability to receive a fair trial.

III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.